STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. **Case No. 13-CF-1074**

CHONG LENG LEE,

Defendant.

ORIGINAL

CLERK OF CIRCUIT COURT
OUTAGAMIE COUNTY FILED
FEB - 8 2016
AT O'CLOCK

DECISION

BEFORE: **HONORABLE GREGORY B. GILL, JR.**
Circuit Court Judge, Branch IV
Outagamie County Justice Center
Appleton, WI 54911

DATE: **February 3, 2016**

APPEARANCES: **CARRIE SCHNEIDER**
District Attorney
Appearing telephonically on behalf of the State

ANDREW MAIER and **ALEXANDER DUROS**
Assistant District Attorneys
Appearing on behalf of the State

EVAN WEITZ
Attorney at Law
Appearing on behalf of the Defendant

CHONG LENG LEE
Defendant
Appearing in person

Joan Biese
Official Reporter, Branch IV
Outagamie County

Exhibit 15

TRANSCRIPT OF PROCEEDINGS

THE COURT: We are on the record in 13CF1074, *State of Wisconsin v. Chong Lee.*

Mr. Lee appears in person, along with his counsel, Attorney Evan Weitz. The State is represented by Outagamie County Assistant District Attorney Andrew Maier, as well as Outagamie County Alex Duros. Oh, I'm sorry. We have, by way of telephone -- thank you, Mr. Maier. We have, by way of telephone, Outagamie County District Attorney Carrie Schneider.

And then we also have a Jackie -- how do I pronounce your last name, Jackie? I'm sorry.

MS. PISCHE: Pische.

THE COURT: Pische?

MS. PISCHE: Yes.

THE COURT: Okay. Very good. Thank you again.

We are here today on essentially two separate motions. The first motion is a motion which was filed by the defense. It was captioned as a motion to dismiss or alternatively to suppress, and in particular, the defenses takes issues with two basic items.

The first issue raised by the defense relates to

the overall dilatory approach taken by the prosecution with respect to discovery. As the defense argues, throughout the course of the case there has been no less than four motions to compel filed, and this is demonstrative of the delay which is associated with this case.

The second issue, although it relates to the first issue relayed by the court, pertains to the Appleton Police Department's destruction of certain interviews that were conducted of three potential witnesses to the case.

Now, to address the first issue, and that being that of the timeliness. Wisconsin Statute Section 971.23 mandates that within a reasonable amount of time the prosecution is required to disclose to the defense certain evidence defined by nine separate categories. Those include exculpatory evidence, criminal record, copies of witnesses recorded or written statements.

Now, failure to provide the required information within a reasonable time and manner may constitute a violation of a defendant's constitutional rights and may serve as a basis for dismissal. By way of example, Wisconsin State Constitution Article 1 Section 7.

To determine whether or not a defendant's constitutional rights to a prompt resolution have been violated, United States Supreme Court, as adopted by the Wisconsin Supreme Court, has established a four-part test examining, first of all, the length of delay; second, the reason for the delay; the defendant's assertion of his right; and the prejudice to the defendant. *Day v. State*, 61 Wis.2d 236, a 1973 case, and that is citing *Barker v. Wingo*, a 1972 United States Supreme Court case, 407 U.S. 514.

Now, the -- the essence of the right to a speedy trial is not subject to a bright line determination and must be considered based upon the totality of the circumstances that exist in any specific case. *State v. Borhegyi*, 222 Wis.2d 506, a 1998 Court of Appeals case. Now until there is some delay which is presumptively prejudicial, it is unnecessary to inquire into the other *Barker* factors. Again, *Borhegyi* provides a support for that.

It is against that backdrop that the court applies the facts of this case. Now, trial in this case was originally set for March of 2014. This was after a complaint had been filed on or around December 16th of 2013, which was only a few days

subsequent to the incident giving rise to the cause of action. Notwithstanding the above, the case has been rescheduled multiple times and is now set to commence in late February, some two plus years after the filing of the action.

Now, under *Borhegyi*, a 17-month delay is presumptively prejudicial, and accordingly, and like in the case of *Borhegyi,* the court moves on to the remaining elements of the analysis.

The second element is the reason advanced for the delay, noting that a deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason, such as negligence or overcrowded courts, should be weighed less heavily but, nonetheless, should be considered since the ultimate responsibility for circumstances must rest with the government rather than the defendant. The. *Borhegyi* case again provides us that quote in citing the *Barker* case.

Now, in this case the defense would have the court believe that the delay was predicated upon the failure of the State to provide discovery in a prompt fashion. While the record and numbers of motions to compel would tend to support this argument, like many

things, first glances often do not tell the full story.

When looking at the motions to compel which prompted part of the delay, all appear to have been legitimately filed within a reasonable amount of time of the discovery of the need to make the request. That said, some of the information sought was not necessarily the type of information that the State could have reasonably anticipated. To that same point, once requested, the information was by and large readily provided, again, assuming that said evidence existed. While one recognizes that it would be preferable that motions to compel not be filed, their mere existence cannot necessarily lead one to the conclusion that the recipient of the emotion -- recipient of the motion has engaged in nefarious conduct. This case certainly tends to support that observation. Upon receiving initial discovery requests, it appears that a voluminous response was provided. To that same end, and as noted, once the information was requested, it was provided promptly. While, and again to reiterate, the preference would be that such motions not be filed, the reality is that the District Attorney in this county as well as many other counties handle many cases each year with

multiple departments that often are handling multiple cases. This fact is not at all surprising -- is not at all -- the fact that not all are on the same page is not surprising in terms of the subjects of the motion to compel. Similarly, the defense has multiple cases which may have slowed the ability to address many issues. As was often the case here, many times the parties were working out their own ways to resolve issues, and this is demonstrative of the clogged calendars of the attorneys. In addition to the above discovery issues creating the delay, the need to translate in acceptable format has posed an issue. Also, the issue, as mentioned by this court, of calendaring has played a factor in the delay. As a practical matter, at a minimum in this case there have been three separate calendars to contend with, the court's, the district attorney's and defense counsel. If inherent job obligations did not make scheduling difficult enough, defense counsel also serves as an adjunct faculty member at one of the state's two law schools, and at times this has posed an issue.

In summation, I conclude that the delays in this case, although unfortunate, have been a byproduct of many different issues, none of which the court

concludes are frivolous or done with the intent to delay but, rather, are in many respects inherent in complex and serious litigation.

This brings the court to the third step in the analysis, the defendant's assertion of his right to a prompt resolution. In this case Mr. Lee has never made an overt request for a speedy trial. That said, it is expected and understood that a defendant would prefer to have a case concluded in an efficient and expedient manner as opposed to one fraught with delays.

Now, the final step in the analysis is the prejudice to the defendant. In this instance, while delays certainly affect memories, it is not lost on this court that an event as significant as this is much more likely to remain in one's memory than perhaps a crime involving a simple misdemeanor. On that same token, much of the time has allowed the parties to fully develop theories, expand discovery, and obtain at least one expert. More importantly, it does not appear in the record that the delay was done to cause prejudice as opposed to it being a natural byproduct of delay.

In summation, while the delays are frustrating, and at least a part are attributable to the conduct

of the prosecution, I do not find the conduct to rise to the level warranting dismissal of this action. Accordingly, the request to dismiss is denied.

With that, the court now turns to the second issue before it, and that is the destruction of evidence, and, in particular, the destruction of three interviews and related materials from individuals who are at the scene of the incident.

Now, recently, the Supreme Court in *State v. Luedtke* addressed the issue of destruction of exculpatory evidence. 362 Wis.2d 1, 2015. And again, that is *State v. Luedtke*. Therein the court determined that in order for a moving party to succeed on a destruction of evidence motion, the party must show, number one, the State failed to preserve evidence that was apparently exculpatory or, two, acted in bad faith by prevailing -- or by failing to preserve evidence that was potentially exculpatory.

Now, as noted by the State in its brief, apparently exculpatory evidence is that of the type of evidence that possesses an exculpatory value that was apparent to those who had custody of the evidence before the evidence was destroyed, and, two, the evidence is of such a nature that the defendant is

unable to obtain comparable evidence by other reasonable available means. *State v. Munford*, 330 Wis.2d 575, a 2010 Court of Appeals case.

Now, potentially exculpatory evidence conversely is that type of evidence which has the potential to be exculpatory or useful but does not provide the direct link associated with apparently exculpatory evidence. In this case, the court, after reviewing the briefs of the parties and the summaries provided primarily by the defense, concludes that the statements at issue are of the latter category, namely, that of potentially exculpatory evidence.

That being the case, the court turns to the next analysis, namely, was the destruction of evidence done with bad faith. Now, conduct is considered bad faith if the State was, number one, aware of the potentially exculpatory value or usefulness of the evidence and the State filed to preserve, and, two, acted with official animus or made a conscious effort to suppress exculpatory evidence. Again, the *Luedtke* case provides us with that authority.

In this case the court concludes that there is a sufficient indicia to suggest that bad faith as defined here was present. First of all we look at the nature of the evidence. Now, the court concludes

that the police were aware of the nature of the evidence. The court reaches this conclusion based upon the following: Number one, the court (sic) felt it appropriate to initially interview the three individuals as potential witnesses; number two, the recordings of those individuals were maintained for many months before destruction; number three, even after the destruction of evidence, the images and names of the three remained on the white board, a board which the court understands is used to track the investigation. There, the inclusion on the board, begets the question, if not potentially exculpatory, why remain on the white board. Once the three were disclosed to opposing counsel, those three individuals were reinterviewed, thus bringing to question why reinterview if not potentially exculpatory.

Next, at some point the police made an effort to notify the DA of the destruction of the evidence. With respect to the decision to eliminate the records, the court notes that the *Luedtke* case does not mandate that the suppression be of actual exculpatory evidence. As such, the court concludes that this element also allows for the consideration of potentially exculpatory evidence. Here the court

concludes there was suppression. It appears that the decision to destroy was made with some forethought. Two, while the choice to destroy the records may have been purely motivated, i.e. to protect the witnesses, the result is the intentional suppression of interviews. Three, based upon this court's review of policies pertaining to the retention of interviews, the destruction, while perhaps not in violation of a direct policy, was certainly an unusual practice and inconsistent with the spirit of interview retention policies maintained by the Appleton Police Department.

While the court recognizes it is imputing the conduct of the police to the District Attorney's office, and by all accounts the court finds the District Attorney's office played no role in the decision to delete the evidence, courts have held that it is appropriate to attribute this conduct to the State when there is a strong relationship between the two agencies. In *Jones v. State* the court, addressing a distinct discovery issue from that in this case, concluded that the prosecuting attorney's obligations under the section extended to material and information in the possession or control of members of his staff and of any others who have

participated in the investigation or evaluation of the case and who either regularly report or, with reference to this particular case, have reported to the office. Again, *Jones v. State*, 69 Wis.2d 337, a 1975 case. The court sees no reason why the same logic should not exist here where the police was working closely with the District Attorney's office in pursuit of this matter.

As such, and in light of the foregoing, the court concludes that action is warranted. While dismissal is an option, the court finds it unreasonable in light of the facts and circumstances associated with this case. That said, the alternative remedy of suppression is appropriate. As such, the court (sic) shall be prohibited from calling Ryan Thao, Mikey Thao and Watou Lee. That said, should the police or, rather, should the defense inquire into the police conduct of the destruction of the tapes, it may present cause to have the issue revisited.

The court should mention that it is not meant to suggest that the court is of the opinion that the police department engaged in intentional destruction of evidence in an effort to usurp the defendant's right to a fair trial. That said, the court does

feel that in this instance the police has blurred the lines between its role of gathering information and solving crimes and that of the prosecution, which is, namely, to prove the guilt of an individual. When those lines get blurred, particularly in today's age, it allows conspiracy theorists to run rampant. This the court will not have. While the decision today is serious, it is appropriate to preserve the integrity of the process. Accordingly, that shall be the order of the court as it relates to the motion to suppress the three witness statements previously mentioned.

Now, the next issue before the court is the motion to compel. There in the motion the court (sic) sought eight categories of information. The court will address each of those in turn. The first item, the court (sic) sought information related to every witness that was talked to by law enforcement in reference to this case. The prosecution seems to largely be willing to agree to this request based upon the court's review of the motion and so no further action will be taken.

Similarly, in bullet point two, the defense seeks information related to every officer who participated or observed an interview with the witness. Again, the process has agreed to turn over

these records. That said, what the court is not expecting is the department to go to every employee in the department and conduct an individual inquiry of its employees.

Now, the third request relates to reports, diagrams of every interview. The court feels this is appropriate with the exception of internal communication between the District Attorney's office and the State which may be considered work product. If there is a question, the court -- the State may file the materials in camera for review.

The fourth request seeks all recordings of interviews and inspection for the same. The State seems to agree, and to the extent it has not been complied with, the court shall order it. To the extent a recording was not made, an explanation as to the reason for the same shall be provided.

This order thus addresses request five as well.

Bullet point six or request six requests all e-mails, internal memos and correspondences between members of law enforcement that discussed the investigation of this case. The court does feel that that is appropriate for the same reasons previously identified.

Bullet point seven is where the court diverges

on the appropriateness of the request. Bullet point seven asks for internal communication between that of members of law enforcement and the District Attorney's office. The court concludes that this is requesting information encompassed by the work product doctrine and, thus, is generally excludable from discovery evidence. In absence of some evidence showing that there was a nefarious relationship between the two agencies, the court is not inclined to order what would be tantamount to a fishing expedition.

Bullet point number eight asks for the information particularly identifying or related to Jack Thao, Peter Moua, Dia Vang, Keng Joseph Vang, and Phonesay Saengphachanh, and I'm going to spell the last name, S-A-E-N-G-P-H-A-C-H-A-N-H. The court is going to grant that request for those -- information associated with those individuals.

Any other questions, Attorney Maier?

ATTORNEY MAIER: No.

THE COURT: Attorney Weitz, any other questions, sir?

ATTORNEY WEITZ: Your Honor, just in regards to the motion to compel discovery, I know we do have a pretrial coming up next week Tuesday. I

guess I would ask that the State be required to provide that information, being that we are so close to trial, by that Tuesday date.

THE COURT: Attorney Schneider, to the extent you're able to hear, I'll ask for your input or --

ATTORNEY SCHNEIDER: I couldn't hear anything but judge, and then I didn't hear anything else Attorney Weitz said.

THE COURT: The -- with respect to the motion to compel, Attorney Weitz's request was that the motion to compel be complied with by next Tuesday, which is the pretrial conference. Is there any reason why that cannot be accomplished?

ATTORNEY SCHNEIDER: Well, one of the things the court ordered was us to release all e-mails between investigators on the case?

THE COURT: Yes.

ATTORNEY SCHNEIDER: I have to -- I have to ask them how quickly they can or can't do that. I don't know, because I don't believe that the subject line will always be "Chong Lee" where it's going to be easy way for us to search that. I am not familiar with the Appleton Police Department e-mail system and its search capabilities. If we run into issues on

that, I will let the court know.

THE COURT: Thank you.

ATTORNEY SCHNEIDER: But as to Items 1, 2, 3, 4 and 5, we provided anything and everything we've been able to locate, and I think we mentioned that when we were back in chambers, so I don't -- I'm not going to provide them with another set of the police reports, another set of the recordings, another set of the items they've already been provided.

On item six, we'll -- I'll see if there is anything else. We'll look into that e-mail system. And then on item eight I think a lot of their requests were for people that the police department didn't speak to, so there's not going to be anything to provide, but I need to talk with law enforcement about that. I think we provided them with photos of some of those people, but they weren't further spoken to, so I'll just double-check that, but I don't think we have any issues complying by next Tuesday.

My only concern right now is that e-mail request, not knowing the Appleton system or what ability the sergeant or the head of detectives for Appleton Police Department has over the next 48 hours to 72 hours to work with me on that. So I'll find that out tomorrow and let the court know by noon if

there is going to be any issues.

THE COURT: Sure. And I appreciate you mentioning the fact that many of those requests have been complied with. I was aware of that, and so, to be clear, I'm expecting only new information to be provided that has not been complied with already. To the extent that there already has been compliance, I'm not expecting a duplication of documents or orders or things of that nature, just to be clear. If there are additional documents which may fall under paragraphs, or requests one through six, I would of course expect a supplement, but to the extent that they've already been complied with, I'm not expecting duplication.

ATTORNEY SCHNEIDER: Okay. So I'll provide notice by noon tomorrow if we're going to run into any issues, and if there are any of those that we end up getting, because I don't know what we're going to find, and I feel I want the court to do an in camera review of, I'll supply those as soon as I get them.

THE COURT: Very good. Attorney Weitz, you had a question?

ATTORNEY WEITZ: Yes, Your Honor. Just in regards to the duplication. Certainly we don't want the State to have to provide us stuff that's already

been turned over, but I guess as it relates to paragraphs one and two, which paragraph one specifically asks for a listing of the witnesses, which certainly witnesses have been provided piecemeal through police reports and stuff like that, but I don't know that there has before ever been a list of witnesses.

And then, furthermore, paragraph two says that, for those witnesses to specifically name the officer, detective or whoever was responsible for those interviews and when those occurred. So I think those would be new items, the way I understand it.

THE COURT: Attorney Schneider, go ahead.

ATTORNEY SCHNEIDER: Any witness -- the way Appleton Police Department are written, any witness that they speak to, the officer identifies, usually on the first page, the person's full name, middle initial, date of birth, address info and phone number that they have at the time. They are -- then, within that individual officer's report, he will list the contents of his conversation with that party. I do not believe that there have been times where addresses have not been provided for witnesses that they spoke with or that they spoke to. The individual officer's reports would identify who he

was speaking to as well as if there was another officer with him. I almost feel like what they're further requesting in one and two is for me to either cut apart the police reports and give them just those pages that had the person's name with the address info and the officer's name, or creating an index of the reports for them, which they could do themselves.

THE COURT: No. What I'd be expecting -- maybe to clarify, what I'd be expecting is, by way of example, if there's not individuals you've identified as witnesses or potential witnesses, that that be provided. To the extent that they've already been provided through various reports or identification, I'm not expecting duplication.

As it relates to the officers who participated in the interviews, if that's contained within the reports of individuals already provided, that's fine. If, however, there would be other officers that may not be listed or there may have been interviews for which reports have not been generated, then I would expect an updated level of correspondence to comply with that request.

Does that make sense, Attorney Schneider?

ATTORNEY SCHNEIDER: It does.

THE COURT: Okay. Anything else, Attorney Weitz?

ATTORNEY WEITZ: Just one other thing, Your Honor. Then for -- I guess it most specifically relates to paragraph eight, but I believe one of the things that the court did grant and order was -- I'm not seeing immediately which paragraph it is, but the request, if a recording does not exist, an explanation as to why that recording does not exist, so that would be a new item that would be dealt with then separately, if I understand the court's order correct.

THE COURT: Yes. Attorney Schneider, anything further?

ATTORNEY SCHNEIDER: No. I didn't necessarily hear everything that was said, but I'll -- I can get from Attorney Maier what was said at that point. I just think if a recording doesn't exist for one of the people, an explanation why one doesn't?

THE COURT: Yes, that's correct.

ATTORNEY SCHNEIDER: Okay.

THE COURT: And again, I'm not expecting a novel, I mean I'm expecting a short explanation on each of those items.

ATTORNEY SCHNEIDER: Understood.

THE COURT: Okay. And then it would be -- I suppose, just hopefully I made it clear, I don't know if the defense was anticipating calling the three witnesses that I've identified as being suppressed. Understand that if they get called, that may potentially open the door for further questioning of those witnesses. I think I did hopefully make that clear that, you know, if officers are inquired about the destruction of the evidence or alternatively those witnesses get called, that may reopen the door potentially.

ATTORNEY WEITZ: And I guess, my only thought is, certainly I think that the defense should be allowed to ask the officers questions about the missing recordings. Would that by itself -- is that what the court is saying?

THE COURT: Well, here's the problem, because, by way of example, if the argument is going to be Appleton police destroyed these evidence -- this evidence, which the inference is going to be we want the jury to believe they did something improper, then that will open the door to allow the police department to say -- and I only mention this because I think Sergeant Rabas has testified to this already,

the reason I did this is because these witnesses were afraid and they didn't want that information released. So even though it may have -- even though -- and I've already given my decision, even though I conclude that that was not appropriate given precedent, they may be allowed to explain the reason for doing so, and dependent upon what is asked or what happens, that may potentially open the door to question Mikey or Watou, and I know there is one other person I'm missing. So it's -- it's hard for me to anticipate what will open that door, but just understand that potential questioning of the officers may allow them to explain why they did what they did, and if then to rebut that you decide to call those witnesses, that may reopen the whole issue. I just want you to understand that - I don't mean this in a lighthearted way - there is no free lunch. I mean, everything is a give and take.

ATTORNEY WEITZ: And that certainly makes a lot more sense now the way that you've explained it. I was under the initial impression that it would just open the door automatically to every single statement from those witnesses coming in, but I certainly see that if there is questions about the destruction that they should be afforded the opportunity to explain

the reasons for it but not bring in then all the underlying statements made by those witnesses, if I understand the court correctly.

THE COURT: That's correct. But if, by way of example, those three witnesses get called in to explain or to rebut, then that may open the door because now you have those witnesses on the stand.

ATTORNEY WEITZ: Very good.

THE COURT: Anything else, Attorney Schneider?

ATTORNEY SCHNEIDER: Would the court be of the same thought -- this is just one other thing I'm thinking of -- is if defense, I'm going to say, opens the door, makes argument or statements that there were these other people in the front area that law enforcement didn't talk to, and they -- they attacked the police in that way, shape or form, then I would be at least allowed to have the court reconsider or make the argument they've opened the door and we can then talk about the statements from those three parties?

THE COURT: I think you could at least -- and what we would do is similar as what we've discussed, request a side bar and we could potentially -- so I would at least entertain it. And

again, it's too speculative for me to give a definitive answer one way or the other, but I'm always willing to listen to the arguments as proffered. But at this point in time, like I said, the State would not be able to, in its case in chief, call in those three witnesses, but that could be revisited depending upon how the case proceeds and what questions get asked.

ATTORNEY SCHNEIDER: Understood. And then I'm assuming the court would also not want their defense expert to reference to destruction of tapes, et cetera, or they run the risk if they do.

THE COURT: That's right. They run the risk of potentially opening that door. That's absolutely correct.

ATTORNEY SCHNEIDER: Okay. Nothing further that I can think of at this point.

THE COURT: Attorney Weitz, anything further?

ATTORNEY WEITZ: Just one other brief thing. I did give Attorney Maier a heads up on this. One additional thing that I guess we would be requesting of the State, and I don't know Attorney Schneider's position on this, I know the State filed their witness list back on January 22nd, and I

assume, just in the interest of not disclosing the full addresses of all these witnesses to the public, just listed city and state. I would ask if the State could either provide the defense or file under seal or some way of giving us updated addresses so the defense has those addresses for these witnesses. I know that it's been roughly two years since some of these witnesses have been talked to, so perhaps things have changed since the police reports were written, so I guess I would ask that of the court.

And I don't know if you have a position either way, Attorney Schneider.

THE COURT: If we do it under seal, are you okay with that, Attorney Schneider?

ATTORNEY SCHNEIDER: Yeah. Or what I can actually do is I can provide it directly to defense, then it never becomes part of the public file.

ATTORNEY WEITZ: That would certainly work as well.

THE COURT: Provided you're willing to do that, that would be fine.

ATTORNEY SCHNEIDER: Okay.

THE COURT: All right. Very good. Then I will see everyone next Tuesday. We will be adjourned.

ATTORNEY WEITZ: Thank you.

(Proceedings concluded.)

C E R T I F I C A T E

STATE OF WISCONSIN)
) ss.:
COUNTY OF OUTAGAMIE)

I, JOAN BIESE, RMR/CRR, do hereby certify that I am the official court reporter for Branch IV of the Circuit Court of Outagamie County;

That as such court reporter, I made full and correct stenographic notes of the foregoing proceedings;

That the same was later reduced to typewritten form;

And that the foregoing proceedings is a full and correct transcript of my stenographic notes so taken.

Dated this 8th day of February, 2016.

JOAN BIESE, RMR/CRR